No. 4004

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY RITTER,
Plaintiff in Error,

—vs—

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES T. BOYD,
Attorney for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

During the May Term of the District Court of the United States of America for the District of Nevada, the Grand Jury for the District of Nevada found an indictment against Henry Ritter and D. Church, charging them with a violation of the National Prohibition Act. The indictment contained two counts against them.

The first count charges that the defendants,

> "did unlawfully, wilfully and knowingly have in their possession intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, fit for use for beverage purposes."

The second count charges that the defendants,

> "did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent, or more of alcohol by volume, fit for use for beverage purposes."

The defendants were arrested under the indictment and were tried in the District Court of the United States for the District of Nevada, on the 15th day of December, 1922. The defendant, D. Church, was acquitted on both charges and the defendant, Henry Ritter was found guilty on both charges, and thereafter and on the 19th day of February, 1923, the defendant, Henry Ritter, was sentenced to be imprisoned in the County jail of Washoe County for a period of four months from and after that date.

The defendant, Henry Ritter, was allowed a writ of error to this Court for the alleged errors occurring in the proceedings during the trial of the said case.

After the impanelment of the jury, and prior to the introduction of any testimony the plaintiff in error, objected to the introduction of any evidence upon the ground that the indictment failed to state facts sufficient to constitute a public offense. Prior to sentence and within time the defendant made a motion in arrest of judgment, and also made motion for a new trial, both of which, were denied by the Court, and the defendant sentenced.

The plaintiff in error relies upon certain errors alleged to have been committed by the Court, and excepted to by the defendant and from the records they may be summarized as follows:

(1) That the indictment does not allege facts sufficient to show a violation of the National Prohibition Act.

(2) That the Court erred in admitting hearsay testimony over the objection of the plaintiff in error.

(3) That the Court erred in refusing to give the instruction requested by the plaintiff in error with reference to Decoys.

(4) That the Court erred in denying plaintiff's in error motion in arrest of judgment.

(5) That the Court erred in denying the motion of the plaintiff in error for a new trial.

Taking the first proposition advanced:

THAT THE INDICTMENT DOES NOT ALLEGE FACTS SUFFICIENT TO SHOW A VIOLATION OF THE NATIONAL PROHIBITION ACT.

The first count in the indictment alleges:

> "did unlawfully, wilfully and knowingly have in their possession intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes."

That this count is not sufficient, taken as true, to charge the plaintiff in error with the offense, for the reason that the National Prohibition Act does not make possession alone of intoxicating liquors to be an offense, as the law allows the plaintiff in error to have intoxicating liquor in his private dwelling for his own personal consumption, or for the use of such guests as he may have in his private dwelling. The intent of the Act being to prevent the possession of intoxicating liquor for sale.

See Prohibition Act, Title II, Section 33.

Nothing in the indictment negatives the fact that this liquor was not in the private dwelling of Henry Ritter, or was not for the use of himself or his family residing in such dwelling.

> "In the absence of facts showing why the possession was unlawful, the indictment charging "the defendant did unlawfully possess etc., is a mere conclusion." . . . . . where the liberties of the defendant are involved, all the facts necessary to bring the case within the intent of the Act must be alleged, as no intendments can be indulged in favor of the indictment."
>
> United States v. Horton, 282 Fed. 731.
>
> Keck v. United States, 172 U. S. 434.

While the National Prohibition Act makes possession of intoxicating liquor for beverage purposes unlawful, Section 33 of Title II of the Act provides that it shall not be unlawful to possess liquor for the use of himself in his own private dwelling, etc.

United States v. Boasberg, 283 Fed. 311.

The facts set out in the second count of the indictment nowhere allege that the plaintiff in error, Henry Ritter, sold the liquor with the knowledge that it was to be used for beverage purposes, or that the liquor so sold was used for beverage purposes. The authorities heretofore cited sustain this proposition.

THAT THE COURT ERRED IN ADMITTING HEARSAY TESTIMONY OVER THE OBJECTION OF THE PLAINTIFF IN ERROR.

During the course of the trial the witness, Thomas Scott, testified that after the arrest of Mr. Ritter, he informed Officer Nash in the presence of Henry Ritter, that Mr. Church had sold the drinks. This the plaintiff in error objected to on the ground that the testimony was immaterial, irrelevant, and incompetent.

See page 54 of the Transcript of Record.

Mr. Nash in his testimony stated:

> "Mr. Scott told me that Mr. Church sold the drinks and Mr. Ritter brought in the bottle."

See page 73 of the Transcript of Record.

This testimony was admitted over the objections of the plaintiff in error.

The testimony given does not enter into the elements of the offense, nor is it a part of the Res Gestae for the reason that it is merely the report of

one officer to another of what had transpired and is a description of a past event.

The testimony of Mr. Nash before the jury in that particular was not the testimony of a fact that had occurred but merely a testimony of what Mr. Scott had told him after the alleged offense had been completed, and was purely hearsay, Mr. Nash having no actual knowledge of the offense.

See Jones on Evidence, Section 299.

Hauger v. United States, 173 Fed. 54.

Greenleaf on Evidence, Volume 1, page 182-3-4.

William Vaughn v. Oklahoma, 42 L.R.A., 889 (N.S.)

Bergen v. People, 17 Ill., 426.

State v. Reidel, 26 Iowa, 430.

Cheek v. State, 35 Ind., 492.

State v. Vincent, 24 Iowa, 570.

THAT THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION REQUESTED BY THE PLAINTIFF IN ERROR WITH REFERENCE TO DECOYS.

The instruction requested by the plaintiff in error, Henry Ritter, should have been given. It was taken bodily from the Peterson Case that had been previously passed and approved by this Court.

See page 11 of the Transcript of Record.

Henry Ritter's defense to the first count of the

indictment was that he had been induced by the officers to give them liquor. That it was a very cold day, the wind blowing and also snowing, when Officers Scott and DuBois, came to his place as they claimed to be cold and were shivering and kept continually asking him to give them a drink on account of their condition, in fact working upon the sympathies of Ritter, until finally Ritter did in fact give them the liquor they asked for. That they had spent over twenty minutes to half an hour, at least, coaxing him for a drink. They both left the place and returned in about three quarters of an hour, and commenced asking again for drinks and he gave them the drinks the second time.

See Ritter's testimony, pages 82, 83 and 84 of the Transcript of Record.

We think the testimony of Ritter justified the giving of the instruction requested.

Officers ought not to be allowed to take advantage of the Act of Ritter after they had made the appeal they did to his sympathies and influenced him in the matter wherein the average man is most easily influenced. The Court in its opinion simply refused to follow the Peterson Case (see page 56 of the Transcript of Record) and stated frankly from the bench in answer to Mr. Diskin "that the instruction was taken from the case of the United States v. Peterson."

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> The Court—"Yes, I understand that, and I cannot follow it. It simply means this, if I understand that instruction: If a Federal official goes into a soft-drink place, asks for a drink of whiskey and gets it, the man who sells it is not guilty. I cannot understand it any other way; and this is not the decision in the Circuit Court of Appeals in this district by later authorities."

The learned Judge that tried this case was not warranted in his criticism by anything appearing in the Peterson Case, in fact the trial Judge seemed to labor under a misapprehension of the facts in that case, and his criticism of the decision in that case was clearly out of place, for that case merely reiterated principles of law heretofore approved by many Courts and was a clear deduction of the effect of many former decisions, both in United States Courts and State Courts.

See Peterson v. United States, 255 Fed. 433.

Taylor v. United States, 193 Fed. 968.

Woo Wai v. United States, 223 Fed. 412.

Sam Yick et al v. United States, 240 Fed. 60.

The statement was made in the presence of the Jury, and may have had a very determining influence upon the minds of the jurors as to what was the law of this case.

We have been unable to find any authorities, or any decision of this Court modifying in the slightest

degree the rule laid down with so much vigor by this Court in the Peterson Case.

We think it unnecessary to enter into any extended argument in support of the proposition advanced in this brief in support of the plaintiff's contention. The errors complained of are clearly set out in the Transcript.

On account of the defects in the indictment as pointed out herein, we think that the Court erred in not granting the motion in arrest of judgment and that the motion should have been granted, and further, on account of the errors occurring during the trial of the cause and the refusal to give the instruction, the Court should have granted the motion for a new trial.

We respectfully submit that the action and decision of the Trial Court should be reversed and be directed to grant the motion in arrest of judgment, or at least a new trial should be granted the appellant in error.

JAMES T. BOYD,
Attorney for Plaintiff in Error.